FILED
NOV 30 1961
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 348

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION OF THE PETITIONER FOR A REHEARING

GEORGE J. FRANCIS,

FRANCES DE LOST,

Farmers Union Bldg.,
Denver, Colorado,

Attorneys for Petitioner.

EASTWOOD PRINTING CO. • 2854 LARIMER • KEYSTONE 4-5406

INDEX

CITATIONS

Cohens v. Virginia, 6 Wheat. 264 6

Culombe v. Connecticut, 367 U.S. 568 2

Fikes v. Alabama, 352 U.S. 191 3

Lansford v. United States, 200 F. 2d 237 (C.A. 10) 5

Marshall v. United States, 360 U.S. 310 5

Payne v. Alabama, 356 U.S. 560 3

Rock v. Pate, 367 U.S. 433 3

Ryles v. United States, 183 F. 2d 944 (C.A. 10) 5

Townsend v. Sain, 365 U.S. 866 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 348

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION OF THE PETITIONER FOR A REHEARING

The Petitioner herein respectfully presents this, his petition for a rehearing of the above entitled case, and in support thereof shows:

1. In his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, this Petitioner urged that the Trial Court was in error in denying his motions to remove the question of entrapment from the consideration of the jury and for a directed verdict of acquital on grounds of entrapment. This Petitioner presented legal argument to this Court in support

of his request. The basic facts presented to this Court, as well as to the Courts below, were that the Petitioner was in such physical and mental condition that any approach and attempt to induce the Petitioner to commit the crime involved would be successful. The argument made in the Petition for Certiorari before this Court was that the Petitioner in the condition described lacked the will and capacity to resist the request of the government agent, and further that the conduct of the government agent, in view of the Petitioner's condition, should not be condoned.

A ground available but overlooked in further support of the Petitioner's position is found in the decisions of this Court with respect to confessions. This Court has held that confessions obtained from persons whose physical and mental conditions were comparable to that of this Petitioner rendered the confessions inadmissable as in violation of due process. This Court recently reiterated its position on this score in the case of *Culombe v. Connecticut*, 367 U.S. 568, 6 Law E.D., 2d 1037, with words that are appropriate to the instant case. In the *Culombe* case this Court set aside a confession because of the lack of voluntariness required with these words:

> ". . . his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self control — is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American Courts for two hundred years: the test of voluntariness . . . if it is not, if his will has been overborne and his capacity for self determination critically impaired, the use of his confession offends due process . . . The line of distinction is that at which governing self-direction is lost and

compulsion, of whatever nature or however infused, propels or helps to propel the confession." 6 Law Ed 2d 1037, 1057 1058

To the same effect are decisions of this Court, such as *Payne v. Alabama*, 356 U.S. 560; *Fikes v. Alabama*, 352 U.S. 191; *Rock v. Pate*, 367 U.S. 433; and the Court's continuing interest in this matter is shown in the grant of Certiorari in the case of *Townsend v. Sain*, 365 U.S. 866, which Petition for Certiorari is still pending. If a confession of the commission of crime is set aside because of the tests set forth in the above cases, then all the more so should this Court intervene where the commission of the crime itself is induced in this Petitioner in view of his above-noted condition. Certainly, a confession to the crime involved in the instant case if procured from the Petitioner while in the condition that he was, could not be upheld in view of the above cases. No sound reason exists why a distinction should be made in cases involving confessions as contrasted with cases involving entrapment.

2. Whether the Trial Court was in error in failing to charge the jury as requested to the effect that the government had the burden to prove that there was not entrapment. This ground submitted in this Petition was presented to the Court of Appeals and the ruling of the Court of Appeals on this ground is found at Page 16 of the Petition for a Writ of Certiorari. This was a ground available to this Petitioner but not presented in the Petition for Certiorari recently denied by this Court. The Petitioner asked the Trial Court to instruct the jury as follows:

The burden is upon the government to prove by com-

petent evidence beyond a reasonable doubt that there was no entrapment of this defendant and you are instructed that if you find from the evidence and beyond a reasonable doubt that the plaintiff had a reasonable cause to believe that the defendant was dispensing drugs of the kind alleged without prescription, in the manner alleged, and attempted to obtain evidence of such dispensing, you should find him guilty of the offenses charged in counts 1 and 3 of the information if you should further determine that he dispensed the drugs as charged in the information. (R. 122)

This instruction was requested in addition to the instruction given by the Trial Court and here set forth:

> Now, the defendant's counsel, as you have noted from his argument as an alternative ground for acquittal, claims there was an entrapment in this case. Now, entrapment is defined as the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer. In other words, when the criminal design originates not with the accused, but is conceived in the mind of the Government officers, and the accused is by persuasion, deceitful representation or inducement, lured into the commission of a criminal act, the Government is estopped by sound public policy from prosecution therefor, and an acquittal is warranted if the jury so believe or have a reasonable doubt with respect thereto.
>
> It is well settled, however, that the fact that officers or employees of the Government merely af-

> ford opportunities or facilities for the commission of the offense does not defeat the prosecution as artifice and stratagem and decoys may be employed to catch those engaged in criminal enterprises and to present opportunity to one willing to commit a crime. (R. 117-118)

The requested instruction was refused. As additional grounds for the instruction the Petitioner relied on a closing statement of the Government's counsel in which it was stated: "he was just playing a little cagey . . ." and "the short of it is Ladies and Gentlemen, he apparently had this bulk quantity right on hand there" (R. 113, 122). The request for the instruction was renewed after the above closing argument but again denied (R. 122).

The rule in the Tenth Circuit explicitly requires the instruction as tendered by this Petitioner and refused by the Trial Court. *Ryles v. United States*, 183 F.2d 944, 945, and *Lunsford v. United States*, 200 F.2d 237, 239. The Court below in its opinion thought there was no error in the Trial Court's refusal on the grounds that this Court had deemed the previous instruction on entrapment to be adequate. *Marshall v. United States*, 360 U.S. 310, 311 (P. 16 of the Instant Petition for Certiorari).

However, this Court in its first decision involving this Petitioner did not have the question before it as to the adequacy of the instruction on entrapment. In the first trial the instruction was the same as the instruction given by the court as set forth above. On the first appeal to the Court of Appeals and this Court this Petitioner at no time challenged that instruction. However, on the second trial from which this appeal stems the additional instruc-

tion set forth above and approved by the Tenth Circuit was tendered in the form required by the Tenth Circuit. The Court of Appeals cannot now disavow the rule in its own circuit and hold the instruction given by the Trial Court to be adequate merely because of the *dictum* of this Court in the first appeal. The question of the adequacy of the instruction was never before this Court. *Cohens v. Virginia*, 6 Wheat: 264, 398.

The Petitioner respectfully prays that this Court determine whether the Trial Court was not in error in giving the instruction it gave without including the instruction tendered. The instruction tendered states the law on entrapment and its refusal was prejudicial error.

For the foregoing reasons it is respectfully urged that this Petition for rehearing be granted, and that the judgment of the Trial Court be, upon further consideration, reversed.

Respectfully submitted,

GEORGE J. FRANCIS,
FRANCIS DE LOST,
Farmers Union Bldg.,
Denver, Colorado,
Attorneys for Petitioner.

I, George J. Francis, counsel for the above-named Petitioner, do hereby certify that the foregoing Petition for a rehearing of this cause is presented in good faith, not for delay, and is restricted to the grounds above specified.

.....

Counsel for Petitioner.